

FEDERAL CIRCUIT COURT OF AUSTRALIA

MAHMOUD v MINISTER FOR IMMIGRATION & ANOR [2017] FCCA 2087

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a partner visa – applicant unable to meet criterion 3001 – consideration of waiver of the criterion – compelling reasons offered due to the applicant’s role in the care of relatives – whether the Tribunal overlooked a claim or breached ss.359A or 359AA considered – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.359AA, 359A
Migration Regulations 1994 (Cth)

Cases cited:

Khan v Minister for Immigration (2011) 192 FCR 173; [2011] FCAFC 21
Minister for Immigration v MZYTS [2013] FCAFC 114
Minister for Immigration v SZRKT (2013) 212 FCR 99
MZYIA v Minister for Immigration [2011] FCA 642; (2011) 121 ALD 291
SZBYR v Minister for Immigration (2007) 235 ALR 609; [2007] HCA 26
Waensila v Minister for Immigration [2016] FCAFC 32

Applicant:	FATAT MAHMOUD
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 2081 of 2016
Judgment of:	Judge Driver
Hearing date:	31 August 2017
Delivered at:	Sydney
Delivered on:	4 October 2017

REPRESENTATION

Counsel for the Applicant: Mr N Poynder

Solicitors for the Applicant: Hense Law

Counsel for the Respondents: Mr M Cleary

Solicitors for the Respondents: Mills Oakley

ORDERS

(1) The application as amended on 12 December 2016 is dismissed.

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2081 of 2016

FATAT MAHMOUD

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant, Ms Mahmoud, seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 29 June 2016. The Tribunal affirmed a decision of a delegate of the Minister (the delegate) not to grant Ms Mahmoud a temporary partner visa.
2. The following statement of background facts is derived from the submissions of the parties.
3. Ms Mahmoud is a 58 year old national of Lebanon who first arrived in Australia on 7 January 2011, travelling on a subclass 676 tourist visa. Ms Mahmoud was subsequently granted two further subclass 676 visas

in April and June 2011. On 20 October 2011, she applied for a subclass 836 carer visa in order to help her sister, Ms Mona Mahmoud, who had a premature baby and was not well.¹ Ms Mahmoud's application for the subclass 836 visa was refused by a delegate and, on 27 February 2014, that decision was affirmed by the former Migration Review Tribunal. Before her then current bridging visa expired, Ms Mahmoud lodged an application for a subclass 820 partner visa on 25 March 2014.²

4. Ms Mahmoud was sponsored in her application for the partner visa by an Australian citizen, Mr Nazih Bazih. Ms Mahmoud had known him since her arrival in Australia in January 2011 as his brother, Mounzer Bazih, was married to Ms Mahmoud's sister. The relationship between Ms Mahmoud and Mr Bazih became serious in December 2011 and they had been married on 15 March 2014.³
5. The last substantive visa held by Ms Mahmoud was a tourist visa, which ceased on 31 October 2011.
6. Subclause 820.211(2)(d) of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations) required Ms Mahmoud to satisfy criteria 3001, 3003 and 3004 of Schedule 3 to the Regulations, unless there were compelling reasons for not applying those criteria.
7. On 13 November 2014 the Minister sent a letter to Ms Mahmoud seeking further evidence of her relationship with Mr Bazih, and asking her to provide evidence of compelling reasons for not applying the Schedule 3 criteria.⁴ Ms Mahmoud did not respond to that letter and, on 4 February 2015, the delegate refused her application for the subclass 820 visa, finding that there was insufficient evidence to demonstrate that she and Mr Bazih were in a genuine and continuing relationship⁵ and that Ms Mahmoud did not meet clause 820.211(2)(a) in Schedule 2 of the Regulations.⁶

¹ Ms Mahmoud's previous immigration history is summarised in the delegate's decision, at Court Book (CB) 60

² The application documents are at CB1-46

³ CB33-34 and 154 [9]

⁴ CB51-55

⁵ CB60-65

⁶ CB 56-83

8. The delegate also found that Ms Mahmoud did not satisfy clause 3001 in Schedule 2 of the Regulations, and that there were not compelling reasons for not applying those criteria.

Merits review

9. On 23 February 2015, Ms Mahmoud sought a review of the delegate's decision in the Tribunal.
10. The Tribunal convened a hearing on 26 April 2016. Relevantly to the present case, the following evidence was given:
- a) Ms Mahmoud said that the reason she had originally come to Australia in January 2011 was that her sister needed help with her premature baby, and she wanted to stay until her sister was better.⁷ She had returned to Lebanon once, for around three weeks in May 2013, to "solve issues" with her children. However, she had only told her eldest son about her relationship with Mr Bazih.⁸ She later said that she felt ashamed to tell her other children about the relationship;⁹
 - b) Ms Mahmoud gave three reasons for not wanting to leave Australia in order to apply for her partner visa offshore:
 - i) first, a short time after Ms Mahmoud's sister got better, her sister's husband, Mounzer Bazih, had problems with his health. She said that he could not breathe and was taken to hospital where he had open heart surgery. Ms Mahmoud said that it was around then that she realised it was not right to leave her sister. She said that she then decided that it was "wise to get married to Nazih because I can look after – look after him, he can look after me. We're not, like, younger anymore";¹⁰
 - ii) secondly, Ms Mahmoud's sister was not yet better, and she still suffered from high blood pressure, endometriosis and

⁷ Transcript, 4:36-43

⁸ Transcript, 5:12-39

⁹ Transcript, 38:15-17

¹⁰ Transcript, 6:6-13

back problems.¹¹ Ms Mahmoud said that she does all the housework, the cleaning, the cooking, and she takes care of her sister's four children then aged 5, 10, 12 and 14.¹² She said that her sister does the "small things, like, things, but she can't, like, do the washing, hang the washing, do, like, the mopping or vacuum because she feels like, you know, her, like, you know, neck or her, like, you know, gets swollen" because she had her thyroid removed because of cancer and she gets very tired;¹³ and

- iii) the Tribunal asked Ms Mahmoud whether there was any other reason why she could not return to Lebanon to apply for her visa and Ms Mahmoud said that there was no other reason¹⁴; however she then added that:

*...another reason why I want to stay here because here I felt so happy. I been through very hard time back in Lebanon to raise my children. I have four children, I raised them and they all got married. When I came here to Australia I had really good time in the beginning, but when I got, like, you know – when I met this person it 30 was like, "No, he's a really good person" and like, you know, like, what happened with my sister it was, like, two in one.*¹⁵

- c) the hearing then proceeded as a discussion of issues going to the genuineness of Ms Mahmoud's relationship with Mr Bazih, based loosely on the four factors referred to in regulation 1.15A(3); namely, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the parties' commitment to each other;
- d) relevantly to the present case, after discussing the nature of the commitment of Ms Mahmoud and Mr Bazih, the Tribunal raised, for the first time, evidence that very soon after their wedding, Mr Bazih went overseas.¹⁶ Ms Mahmoud said that he might have

¹¹ Transcript, 7:38-8:25

¹² Transcript, 9:28-34

¹³ Transcript, 10:36-39

¹⁴ Transcript, 10:41-44

¹⁵ Transcript, 11:25-31

¹⁶ Transcript, 41:20-22

gone “to Thailand or something”¹⁷ as he “used to go the Thailand for work”¹⁸. However, when the Tribunal referred specifically to the records of the Department relating to Mr Bazih’s entries and departures from Australia (movement records), which showed that he left Australia at least twice in 2014, from 24 March to 16 April 2014¹⁹ and later in the year for around 20 days²⁰, and that in 2015 he was away again for about three weeks²¹, Ms Mahmoud professed that she could not remember these trips.²² The Tribunal expressed surprise that her husband travelled overseas so soon after their marriage²³ and that she did not know why her husband was away.²⁴

11. Following the hearing, on 6 May 2016 Ms Mahmoud provided the following further evidence to the Tribunal:

- 0 handwritten statements from witnesses who had attended her wedding to Mr Bazih on 15 March 2014²⁵;
- 1 a Health Summary Sheet dated 30 April 2016 for Mounzer Bazih, recording his “Current active problems” as coronary artery bypass graft, hypertension, hypercholesterolemia, ischaemic heart disease, and reflux oesophagitis²⁶ and his “Current medications” for the period to 30 April 2016;
- 2 a Health Summary Sheet dated 30 April 2016 confirming the health conditions of Ms Mahmoud’s sister²⁷;
- 3 a Legal Will Kit signed by Mr Bazih on 3 May 2016 leaving 50 per cent of his estate to Mounzer Bazih and 50 per cent to Ms Mahmoud²⁸;

¹⁷ Transcript, 41:32

¹⁸ Transcript, 42:29

¹⁹ Transcript, 43:8-10

²⁰ Transcript, 43:25-26

²¹ Transcript, 43:26-27

²² Transcript, 43:20-23

²³ Transcript, 43:16

²⁴ Transcript, 43:37-38

²⁵ CB116-119

²⁶ CB 120

²⁷ CB 121

²⁸ CB 122-126

- 4 electricity, telephone and bank accounts in the names of Ms Mahmoud and Mr Bazih²⁹; and
- 5 photographs of Ms Mahmoud and Mr Bazih, including at their wedding.³⁰
12. On 29 June 2016, the Tribunal made its decision, affirming the decision of the delegate and rejecting Ms Mahmoud’s temporary partner visa application.
13. The Tribunal found that Ms Mahmoud did not have a substantive visa at the time of the temporary partner visa application.³¹ It found that Ms Mahmoud did not meet the Schedule 3 criteria as the last substantive visa held by her, namely a tourist visa, had ceased on 31 October 2011. The Tribunal considered whether there were compelling reasons for not applying the Schedule 3 criteria, and acknowledged that it was not limited to considering the circumstances that existed when Ms Mahmoud applied for the temporary partner visa.³²
14. The Tribunal considered Ms Mahmoud’s evidence that the parties lived with Ms Mahmoud’s sister, her brother-in-law and their four children. The Tribunal considered Ms Mahmoud’s claim that she provided her sister with practical help (by doing all the housework, cooking and looking after the children who were aged between 5 and 14) and that her sister was emotionally dependent on her.³³ The Tribunal “appreciated” that Ms Mahmoud provided her sister with practical help and emotional support. However, it found that the other members of the family (i.e. Ms Mahmoud’s husband and brother-in-law) could provide similar help and support if Ms Mahmoud were not there. The Tribunal did not find that Ms Mahmoud’s sister’s medical conditions were a compelling reason to waive the Schedule 3 criteria.³⁴
15. The Tribunal also accepted that Ms Mahmoud was happy in her relationship with her husband, and that she would miss him and the other members of the household if she left Australia temporarily to

²⁹CB 127-131 and 143-150

³⁰CB 132-140.

³¹CB153 [5]

³²CB153 [7]; see *Waensila v Minister for Immigration* [2016] FCAFC 32

³³CB154 [13]-[14]

³⁴CB 154 [15]

apply for the visa. The Tribunal, however, found that the Schedule 3 criteria are applied to all partner visa applicants, and it was “expected” that those in genuine relationships would miss their partners during a relatively lengthy separation. The Tribunal was not satisfied that the emotional hardship would be “so severe” that it gave rise to compelling reasons to waive the Schedule 3 criteria.³⁵

16. The Tribunal then summarised its consideration of the evidence and concluded that it had formed the view that these matters, either separately or together, did not give rise to compelling reasons for waving the Schedule 3 criteria in this particular case. The Tribunal noted that Ms Mahmoud and Mr Bazih, did not give evidence of other relevant circumstances and it consequently found that there were no compelling reasons not to apply the Schedule 3 criteria. Thus, the Tribunal concluded that Ms Mahmoud did not meet the criteria in clause 820.211(2)(d)(ii).³⁶
17. Finally, in relation to the issue of spousal relationship, the Tribunal found that it was not necessary to review the delegate’s finding that Ms Mahmoud was not Mr Bazih’s spouse when she applied for the visa, because she did not satisfy clause 820.211(2).
18. For all these reasons, the Tribunal affirmed the decision not to grant Ms Mahmoud a temporary partner visa.

The current proceedings

19. These proceedings began with a show cause application lodged on 3 August 2016. The applicant now relies upon an amended application filed on 12 December 2016. There are two particularised grounds in that application:

- 1. The second respondent failed to perform its statutory task to review the decision of the first respondent by failing to have regard to or to make any findings in relation to a claim made by the applicant.*

Particulars

³⁵CB155 [17]

³⁶CB155 [19]-[20]

The second respondent failed to consider the claim made by the applicant that one of the reasons she could not return to Lebanon to make an application for a Partner visa was that her sister's husband had problems with his health arising from his open heart surgery.

2. *The second respondent failed to comply with its obligation under s.359A and s.359AA of the Act when, during the hearing on 26 April 2016, it failed to orally give to the applicant clear particulars of information that the Tribunal considered would be a part of the reason for affirming the decision that is under review, nor did the Tribunal ensure that the applicant understood why the information was relevant to the review and the consequences of the information being relied on in affirming the decision under review, nor did the Tribunal invite the applicant to comment on or respond to the information or advise the applicant that she could seek additional time to comment on or respond to the information.*

Particulars

- (a) *The information was in the movement records of the applicant's sponsoring husband obtained by the second respondent from the first respondent, which was to the effect that the applicant's husband had travelled overseas very soon after their wedding, and that he had left Australia at least twice in 2014 and once in 2015 .*
 - (b) *The information was relevant to the applicant's claim that the second respondent ought to have exercised a waiver over the Schedule 3 criteria to enable the applicant to remain in Australia because she would suffer hardship if she is required to return to Lebanon. The information about the overseas trips of the applicant's husband - and the applicant's professed lack of knowledge of those trips - raised doubts about the closeness of their relationship to her husband.*
20. The application is supported by the affidavit of Jodie Ellen Coomber made on 12 December 2016, to which is annexed a transcript of the hearing conducted by the Tribunal on 26 April 2016. I also have before me as evidence the court book filed on 12 October 2016.

21. Both Ms Mahmoud and the Minister filed written submissions and also made oral submissions through their counsel at the trial of the matter on 31 August 2017.

Relevant legislation

22. To be granted a temporary partner visa the applicant must, at the time of application, satisfy the criteria in clause 820.211(2), which relevantly provides:

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse or de facto partner of a person who:

(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(ii) is not prohibited by subclause (2B) from being a sponsoring partner; and

(c) the applicant is sponsored:

(i) if the applicant's spouse or de facto partner has turned 18--by the spouse or de facto partner; or

(ii) if the applicant's spouse has not turned 18--by a parent or guardian of the spouse who:

(A) has turned 18; and

(B) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(d) in the case of an applicant who is not the holder of a substantive visa--either:

(i) the applicant:

(A) entered Australia as the holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder who at the time of entry met the requirements of subclause (2A); and

(B) satisfies Schedule 3 criterion 3002; or

- (ii) *the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.*

23. Criteria 3001 relevantly provides:

- (1) *The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).*
 - (2) *For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:*
 - (a) *if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa--1 September 1994; or*
 - (b) *if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa--the day when the applicant last became an illegal entrant; or*
 - (c) *if the applicant:*
 - (i) *ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or*
 - (ii) *entered Australia unlawfully on or after 1 September 1994; whichever is the later of:*
 - (iii) *the last day when the applicant held a substantive or criminal justice visa; or*
 - (iv) *the day when the applicant last entered Australia unlawfully;*
- or,*
- (d) *if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation--the later of:*

- (i) *the day when that last substantive visa ceased to be in effect;*

and

- (ii) *the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.*

24. When applicable, s.359A of the *Migration Act 1958* (Cth) (Migration Act) sets out when “information” must be provided to the applicant for comment by the Tribunal, prior to it making a decision. Section 359A relevantly provides:

Information and invitation given in writing by Tribunal

- (1) *Subject to subsections (2) and (3), the Tribunal must:*

- (a) *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
- (b) *ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
- (c) *invite the applicant to comment on or respond to it.*

- (2) *The information and invitation must be given to the applicant:*

- (a) *except where paragraph (b) applies--by one of the methods specified in section 379A; or*
- (b) *if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.*

- (3) *The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.*

- (4) *This section does not apply to information:*
- (a) *that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
 - (b) *that the applicant gave for the purpose of the application for review; or*
 - (ba) *that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or*
 - (c) *that is non-disclosable information.*
- (5) *A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 362B(1F).*

Consideration

Ground 1 – did the Tribunal overlook the material provided concerning the health of Ms Mahmoud’s brother-in-law?

25. Ms Mahmoud contends that one of the reasons she does not want to return to Lebanon to apply for her partner visa was the poor health of her sister’s husband, Mounzer Bazih. As stated at [10](b) and [11] above, Ms Mahmoud had provided oral evidence at the Tribunal hearing that her brother-in-law had undergone open heart surgery and she had furnished medical evidence after the hearing which confirmed heart related ailments.
26. Ms Mahmoud contends that the Tribunal fell into error in relation to [14] of its reasons where it stated:³⁷

After the hearing, Ms Mahmoud provided records from Dr [Ghayath] Al-Shelh, general practitioner, confirming the evidence she provided about her sister's medical history and that she has diabetes and major depression. It accepts she needs help with managing a large household including four children, her husband and her brother-in-law. However, it cannot disregard that there are two other adults in the home apart from Ms Mahmoud and

³⁷ CB 154

Ms Mona Mahmoud and that the oldest child is a teenager who could be expected to perform household chores and to provide some care for his younger siblings. Ms Mahmoud has taken on the management of the household because of Ms Mona's Mahmoud's medical conditions. However, there are others who could provide her with significant help and the Tribunal infers they would do so if Ms Mahmoud left Australia temporarily to apply for the visa.

27. Ms Mahmoud further contends that the Tribunal erred by not considering the capacity of her brother-in-law to assist. It is not disputed that her brother-in-law was one of the “two other adults” referred to by the Tribunal in that paragraph.
28. In my opinion, the Tribunal did not overlook the medical condition of Ms Mahmoud’s brother-in-law. Information provided to the Tribunal about that condition said nothing about his capacity to assist and Ms Mahmoud did not claim that he was unable to do so. I otherwise agree with the Minister’s submissions on this ground.
29. At [9] of its reasons, the Tribunal set out Ms Mahmoud’s evidence as to why she came to Australia in 2011, namely, “to help her sister, Ms Mona Mahmoud, who had had a premature baby and was not well”.
30. At [10] the Tribunal outlined the situation regarding the living arrangements for Ms Mahmoud’s family, observing that, “Mr Bazih owned the home her sister lived in with her family and rented it to Mr Mounzer Bazih”.
31. At [11], the Tribunal sets out why Ms Mahmoud had earlier applied for a carer visa, namely, because her sister and her brother-in-law, Mounzer Bazih, had health problems. In particular, the Tribunal identified the health problems of Mounzer Bazih, namely that he “had cardiac problems and had open-heart surgery”.
32. Then, at [14] of its reasons, the Tribunal found that it “accepts [the applicant] needs help with managing a large household including four children, her husband [Mr Bazih] and her brother-in-law [Mounzer Bazih]”. When this finding at [14] is read in conjunction with [9], [10], [11] and [14], it demonstrates that the Tribunal had regard to all the claims and evidence of Ms Mahmoud, including the evidence regarding the poor health of her brother-in-law, Mounzer Bazih.

33. Further, at [19] of the Tribunal reasons, it makes reference to Ms Mahmoud's role "in the household she and Mr Bazih share with their siblings", when giving consideration to whether there were any compelling reasons for waiving the Schedule 3 criteria. The Minister submits and I agree that this reference at [19] to Ms Mahmoud's role "in the household she and Mr Bazih share with their siblings" is clearly a reference back to the claims and evidence of Ms Mahmoud regarding, amongst other things, Mounzer Bazih's poor health as part of the "household" the applicant shared with Mr Bazih and their siblings. The evidence in this regard is set out at [9], [10], [11] and [14] of the Tribunal's decision.³⁸
34. The Tribunal has not failed to give consideration to or make any findings that were relevant to the disposition of the review, including the claims or evidence regarding Mounzer Bazih's poor health. No failure of the kind identified by Robertson J in *Minister for Immigration v SZRKT*³⁹ has occurred in the present case, because all the claims and evidence of Ms Mahmoud were considered by the Tribunal. No jurisdictional error has been committed in this respect. Further, and contrary to Ms Mahmoud's submissions, the Tribunal has not failed to perform its statutory task.⁴⁰

Ground 2 – did the Tribunal breach s.359A or s.359AA of the Migration Act?

35. Section 359AA of the Migration Act provides procedural fairness safeguards where information "that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review" is given orally to an applicant in a hearing. In such cases, s.359AA(1)(b) provides that the Tribunal must:
- (i) *ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and*
 - (ii) *orally invite the applicant to comment on or respond to the information; and*

³⁸ CB 154-155

³⁹ (2013) 212 FCR 99

⁴⁰ cf. *Minister for Immigration v MZYTS* [2013] FCAFC 114

- (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and*
- (iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.*

- 36. Ms Mahmoud contends that, despite the Tribunal at [21] considering it unnecessary to make a finding on the genuineness of the relationship between Ms Mahmoud and Mr Bazih, it was obviously sceptical about the relationship. During the hearing, the Tribunal member expressed surprise about Mr Bazih's several trips to Thailand and Ms Mahmoud's lack of knowledge of his overseas trips, and in its decision at [22], the Tribunal remarked that "some aspects of the relationship are not what might be expected in a married relationship".
- 37. While the genuineness of Ms Mahmoud's relationship was not in itself a reason for affirming the decision under review, the likely emotional hardship to be suffered by Ms Mahmoud if she were to be separated from Mr Bazih while applying for the visa offshore was a matter that was expressly relevant to the issue of the waiver, in the decision at [16]-[17].
- 38. Relevantly to this, Ms Mahmoud contends that Mr Bazih's movement records contained a "rejection, denial or undermining" of her claim that she would miss him if she left Australia temporarily to apply for the visa, since they showed that he had made at least four overseas trips in 2014 and 2015, including one which had been made only nine days after their marriage on 15 March 2014.
- 39. Ms Mahmoud contends that, in the absence of any notification in writing under s.359A of the Migration Act, the Tribunal was required to observe the strict formalities in s.359AA of the Migration Act for providing the information in the movement records to Ms Mahmoud during the hearing. She contends that this would involve ensuring that she knew why the information was relevant and the consequences of the information being relied on in affirming the decision, by orally inviting her to comment on or respond to the information, and by advising her that she could seek additional time to comment on or

respond to the information which was under review. None of this was done by the Tribunal at the hearing.

40. The Tribunal did not make any express reference to Mr Bazih's movement records in its decision. However, this is not the end of the matter. While the Tribunal's reasons for decision may provide a convenient starting point in considering whether the obligation under s.359AA arises, "it is not sufficient, in order to exclude it, merely to point to the reasoning disclosed in the decision after the review has been conducted and completed".⁴¹
41. In *Khan*, a decision to cancel the applicant's subclass 457 visa was affirmed by the Tribunal, ostensibly on the ground that the applicant had ceased working for his sponsoring employer. However, unknown to the applicant, and not mentioned in either the primary or review decision, the applicant's employer had written a letter to the Minister's Department alleging that the applicant had fraudulently included his sister in his visa application as his wife. This was not disclosed to the applicant by either the delegate or the Tribunal.
42. The Full Federal Court (Buchanan, Flick and Yates JJ) found that the information in the employer's letter was of such significance that, despite the Tribunal's failure to refer to it in the reasons, it was necessarily something which had to be a part of the Tribunal's reasons for affirming the delegate's decision.⁴² In arriving at this conclusion, Buchanan J took into account the fact that the delegate's decision could only have been referable to the employer's letter⁴³, while Flick J took into account the fact that the Department's policy guidelines required decision-makers to take into account the broad circumstances in which the ground for cancellation arose, which had to include the employer's letter and its contents.
43. In the present case, Ms Mahmoud submits that it may be inferred that the Tribunal considered Mr Bazih's overseas absence as summarised in his movement records when it made its decision to refuse the waiver,

⁴¹*Khan v Minister for Immigration* (2011) 192 FCR 173; [2011] FCAFC 21 at [45] (Buchanan J)

⁴²*Khan* at [45] and [54] (Buchanan J), [82] (Flick J), [87] (Yates J)

⁴³*Khan* at [54]
Khan at [82]

since it was relevant to Ms Mahmoud's claim that she will suffer hardship if she is separated from him. As such, she submits that the Tribunal erred by not providing this information to her in the manner required by s.359AA.

44. In my view, there was no breach of s.359A and hence no breach of s.359AA. First, the movement records were, on their face, neutral. They simply recorded the departure from Australia and the return to Australia of Ms Mahmoud's sponsor.
45. In *SZBYR v Minister for Immigration*⁴⁴, the High Court held that in order for "information" to be considered "the reason, or part of the reason, for affirming the decision under review", it must contain "in its terms" a rejection, denial or undermining of the applicant's claims to be a person to whom Australia owed protection obligations.⁴⁵
46. In the present case, the only issue to which the movement records were relevant was whether the applicant and Mr Bazih were in a genuine spousal relationship. At the hearing⁴⁶, the Tribunal accessed movement records which showed that Mr Bazih went away for nine days after his wedding, and returned three weeks later. It is apparent from the transcript of the Tribunal hearing that its questions in relation to this information were directed to the timing of Mr Bazih's travel, and plainly in the context of whether the parties were in a genuine spousal relationship.⁴⁷
47. While the Tribunal made mention of the movement records at the hearing, it made no mention of them in its decision. This is because the issue of whether the parties were in a genuine spousal relationship was, ultimately, not an issue in the review. The Tribunal found at [21] that because Ms Mahmoud did not satisfy the criteria in clause 820.211(2), it was "not necessary" for the Tribunal to review the finding made by the delegate that the parties were not in a spousal relationship. At [22] of its decision, the Tribunal further held that as another delegate may be asked in the future to reconsider the issue of

⁴⁴(2007) 235 ALR 609; [2007] HCA 26

⁴⁵*SZBYR* at [17]; cf. *MZYIA v Minister for Immigration* [2011] FCA 642; (2011) 121 ALD 291

⁴⁶At transcript page 43, line 6

⁴⁷See transcript page 11, line 45

whether Ms Mahmoud and Mr Bazih were in a genuine spousal relationship, when considering to grant an off-shore partner visa to Ms Mahmoud, it would not make any findings on that issue.

48. While Ms Mahmoud contends that the movement records also bore on the Tribunal's reasoning at [17], that is not supported either by the transcript or by Ms Mahmoud's own claims. As noted above, it is clear from the transcript that the focus of the Tribunal's attention was the spousal relationship, although that was not ultimately the focus of the Tribunal's decision. Further, Ms Mahmoud's claim was that she was happy not only in her relationship with her sponsor but also happy in Australia with the other members of their family. Her concern was not the temporary absences of the sponsor but rather the risk of being required to leave Australia for a time and be separated from all the members of the family. That is what the Tribunal addressed at [17]. Finally, the movement records might hypothetically have also borne upon the Tribunal's reasoning at [14] because if the sponsor were frequently absent from Australia, he would not be available as one of the "two other adults in the home" to support the other members of the household. That potential application of the information was supportive of Ms Mahmoud's claims, rather than detracting from them.
49. In these circumstances, the obligation in s.359A (or in s.359AA) was not enlivened. Applying *SZBYR*, the "information" relied upon by Ms Mahmoud, namely, the movement records, to enliven the operation of ss.359A or 359AA, was neither a "reason for affirming" the decision under review, nor did the information in the movement records "in its terms" contain a "rejection, denial or undermining" of Ms Mahmoud's claim to be in a genuine spousal relationship.

Conclusion

50. I conclude that Ms Mahmoud is unable to demonstrate that the decision of the Tribunal is affected by any jurisdictional error. It is therefore a privative clause decision and the application must be dismissed. I will so order.
51. I will hear the parties as to costs.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 4 October 2017